STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MICHAEL DELEON,

Defendant-Appellant.

UNPUBLISHED
April 30, 2020

No. 346952
Kent Circuit Court
LC No. 18-002721-FC

Before: MARKEY, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (2)(b) (sexual penetration involving a defendant 17 years of age or older and a victim under 13 years of age), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and (2)(b) (sexual contact involving a defendant 17 years of age or older and a victim under 13 years of age). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 30 to 50 years' imprisonment for the CSC-I conviction and 10 to 22½ years' imprisonment for the CSC-II conviction. We conclude that *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), and *People v Thorpe*, 504 Mich 230; 934 NW2d 693 (2019), compel us to reverse and remand for new trial.

This case arises out of sexual assaults allegedly committed by defendant against HV when she was five or six years old. HV was 10 years old at the time of trial in October 2018. HV testified that defendant sexually abused her on five separate occasions. The assaults involved sexual contact, digital-vaginal penetration, fellatio, and cunnilingus. HV asserted that the sexual abuse took place at the home of defendant's mother. HV testified that she and her mother, who was dating defendant, lived at the house with defendant for a short period of time and that the sexual assaults occurred on a red couch that was located in the middle of defendant's bedroom. HV claimed that the bedroom had no door, that she slept on the couch, that defendant would stop the acts of sexual abuse when her mother approached the room, and that defendant threatened to kill her family if she divulged the abuse to others. The evidence revealed that HV did not report the sexual assaults until early 2018, which was a few years after the abuse had occurred. HV had orchestrated sexual acts involving her younger siblings, and her father's fiancée questioned her

about where she had learned such behavior after one of the siblings spoke out. HV then disclosed defendant's past sexual abuse to her father's fiancée, who contacted Children's Protective Services. The police became involved and a forensic interview of HV was conducted. The forensic interviewer testified at trial about the interview, about HV's demeanor, and about HV's revelations.[1] HV's father and his fiancée also testified. The prosecution additionally called Thomas Cottrell to the stand. Cottrell, who did not interview or meet with HV, testified as an expert in child sexual abuse dynamics.

Defendant testified on his own behalf and was the only witness for the defense. Defendant denied engaging in any sexual conduct with HV. Defendant claimed that HV and her mother never even lived with him at defendant's mother's house, although they had resided together in an apartment before defendant moved back in with his mother.[2] Defendant indicated that HV and her mother had visited him on occasion at the home of defendant's mother. Defendant testified that he did indeed have a red couch that had been kept in the middle of his bedroom at his mother's house and that the bedroom had no door.[3] Defendant denied that HV ever slept on the couch at the house. Defendant acknowledged that the red couch had been kept in the apartment that he once shared with HV and her mother, but it was placed against a wall and not in the middle of a room. Defendant additionally conceded that he had a prior theft conviction—breaking and entering a building.

Defendant was charged with, convicted of, and sentenced for CSC-I and CSC-II. He now appeals. On appeal, defendant first argues that the trial court erred by admitting Cottrell's expert testimony that improperly bolstered HV's credibility and thereby infringed on defendant's due process right to a fair trial. Relevant here, the prosecutor asked Cottrell how often children are coached or lie about sexual assault. Cottrell responded that "it occurs rarely" and that "it's less than two percent of the time that we actually see a child claiming to be abused[] when we indeed believe the abuse did not happen." In noting that coaching is rare, Cottrell stated that if HV had been coached, "she wasn't coached very well," given that HV identified defendant's private parts as a vagina. Cottrell also testified that nine-year-old children—HV's age at the time of disclosure—are not good at lying, and it can be very obvious when they are not telling the truth. The prosecutor, in framing a question for Cottrell, mentioned that HV had essentially given the same account of the sexual assaults to multiple individuals, including the forensic interviewer. And Cottrell then testified, "Typically, children are—who are fabricating abuse or . . . lying, are usually not going to make it through that level of scrutiny." Cottrell next reiterated that in his experience it is rare for children to lie about sexual abuse, occurring in less than 2% of cases. Further, Cottrell opined that, with respect to nine- or ten-year-old children and fabricated claims of sexual abuse, "there needs to be a motivation to lie about something." As examples, Cottrell referred to making a "particular person happy," "getting out of trouble," or "getting some . . .

[1] The forensic interviewer indicated that HV referred to defendant's private parts as a vagina.

[2] Defendant testified that he started dating HV's mother sometime around 2014 and that he moved into the apartment where HV and her mother were living.

[3] Defendant agreed that HV's testimony was generally accurate in describing the home of defendant's mother.

reward." Cottrell testified that "[t]here needs to be a payoff to motivate the child to maintain something that they know is wrong." During closing arguments, the prosecutor commented that "just like Tom Cottrell said, [HV] would not be a good liar." In a closely associated alternative argument, defendant contends that trial counsel was ineffective for failing to object to Cottrell's testimony highlighted in this paragraph.

Generally, we review for an abuse of discretion a trial court's decision to admit evidence. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). Whether a rule or statute precludes the admission of evidence is a preliminary question of law that this Court reviews de novo. *Id*. Because defendant failed to object to Cottrell's testimony, our review of this unpreserved issue is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *Peterson*, 450 Mich at 352-353, the Supreme Court, examining the admissibility of expert testimony in sexual abuse cases involving child victims, held as follows:

> In these consolidated cases, we are asked to revisit our decision in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), and determine the proper scope of expert testimony in childhood sexual abuse cases. The question that arises in such cases is how a trial court must limit the testimony of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in *Beckley* that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in *Beckley* and now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

Our Supreme Court then applied these principles to the particular facts presented in the case and concluded:

> [W]e first hold that in *Peterson*, the trial judge erred in the following areas. First, the experts in that case improperly vouched for the veracity of the child victim. For example, Gillan was allowed to testify that children lie about sexual abuse at a rate of about two percent. O'Melia was allowed to testify, over defense objection, that of the cases and studies he was familiar with, there is about an eighty-five percent rate of veracity among child abuse victims. Although we have no basis to dispute these numbers, their inherent inconsistency shows the difficulties that arise when attempting to vouch for the credibility of a witness. Certainly neither witness stated that the child victim was telling the truth. However, the risk here goes beyond such a direct reference. Indeed, as we have cautioned before, the jury in these credibility contests is looking "to hang its hat" on the

testimony of witnesses it views as impartial. Such references to truthfulness . . . go beyond that which is allowed under MRE 702. [*Peterson*, 450 Mich at 375-376.]

More recently, the Michigan Supreme Court in *Thorpe*, 504 Mich 230, reaffirmed the principles set forth in *Peterson* and addressed testimony given by Cottrell similar to his testimony in the instant case. The *Thorpe* Court stated and held:

> We conclude that Thorpe has shown that it is more probable than not that a different outcome would have resulted without Cottrell's testimony that children lie about sexual abuse 2% to 4% of the time. In *Peterson*, this Court observed that nearly identical testimony allowed the experts in that case to improperly vouch for the veracity of the child victim. Here, not only did Cottrell opine that only 2% to 4% of children lie about sexual abuse, but he also identified only two specific scenarios in his experience when children might lie, neither of which applies in this case. As a result, although he did not actually say it, one might reasonably conclude on the basis of Cottrell's testimony that there was a 0% chance BG had lied about sexual abuse. In so doing, Cottrell for all intents and purposes vouched for BG's credibility. Furthermore, the prosecution's closing argument on rebuttal highlighted this improper evidence at a pivotal juncture at trial[.]
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> Thorpe's trial was a true credibility contest. There was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements. The prosecution's case consisted of BG's allegations, testimony by her mother regarding BG's disclosure of the alleged abuse and behavior throughout the summer and fall of 2012, and Cottrell's expert testimony. Thorpe testified in his own defense and denied the allegations. Additionally, Kimberly testified about other reasons for BG's behavior during the summer and fall of 2012; namely, that her mother had started a new relationship and become pregnant and that Thorpe had decided to no longer have parenting time with BG. Because the trial turned on the jury's assessment of BG's credibility, the improperly admitted testimony wherein Cottrell vouched for BG's credibility likely affected the jury's ultimate decision. Under these circumstances, we conclude that Thorpe has shown that it is more probable than not that a different outcome would have resulted without Cottrell's improper testimony. [*Thorpe*, 504 Mich at 259-260 (quotation marks and alterations omitted).]

We conclude that *Peterson* and *Thorpe* compel us to reverse defendant's convictions in the case before us today. While those cases are not identical to the instant case, they are not sufficiently distinguishable so as to allow us to affirm.

Although much of Cottrell's testimony was proper, the problematic aspects of his testimony, which we discussed above, came extremely close to directly opining that HV was telling the truth and not lying, plainly crossing the line set forth in *Peterson* and *Thorpe*. Cottrell asserted that: (1) children rarely lie about being sexually abused; (2) children lie about sexual abuse

in less than 2% of cases;[4] (3) HV's reference to defendant's private parts as a vagina suggested that she was not coached; (4) nine-year-old children, HV's age at disclosure, are not good at lying; (5) HV's accounting of events went through a level of scrutiny that a child who was fabricating abuse could typically not survive; and (6) a child of HV's age at time of disclosure "needs" a payoff or motivation to lie. When all of these components of Cottrell's testimony are considered together, "Cottrell for all intents and purposes vouched for [HV]'s credibility." *Thorpe*, 504 Mich at 259.

Furthermore, the trial was a true credibility contest between defendant and HV. As in *Thorpe*, "[t]here was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements," and defendant "testified in his own defense and denied the allegations." *Id.* at 260. Once again, the *Thorpe* Court concluded that Cottrell's testimony "likely affected the jury's ultimate decision" and that it was "more probable than not that a different outcome would have resulted without Cottrell's improper testimony." *Id.* Here, under plain-error review, we hold that there was error in allowing the challenged testimony by Cottrell, that the error was plain (clear and obvious), that the error affected defendant's substantial rights, i.e., it was prejudicial, and that the error seriously affected the fairness, integrity, and public reputation of the judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763-764.[5]

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[4] We have no explanation why Cottrell testified in *Thorpe* that the rate is 2% to 4%. *Thorpe*, 504 Mich at 259. The narrowing of the fabrication percentage in the instant case to below 2% lends further support for reversal.

[5] We note that the Supreme Court in *Thorpe* necessarily rejected this Court's determination that, assuming error in allowing Cottrell's testimony, it was harmless. *People v Thorpe*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2017 (Docket No. 332694). This Court had ruled:

> Regardless, assuming error and even proper preservation of the argument, reversal is unnecessary as the error was harmless. The victim testified unequivocally about two incidents where defendant touched her vagina and one incident where defendant made the victim touch his penis. Her accounts were detailed with respect to where she, her stepsister, and defendant were situated in the room when the abuse occurred. The victim testified that she decided that she no longer wished to visit defendant, who is her stepsister's father but not her father, by the fall of 2012, after the incidents had occurred. The victim's mother corroborated the victim's testimony that she was the one who decided to stop visiting defendant at that time. The mother's account of the victim's behavioral changes was also consistent with the prosecution's expert's testimony about the typical behaviors exhibited by child victims of sexual abuse. Furthermore, as already indicated, defense counsel had elicited testimony from the expert that children can lie and be manipulative. And, on recross-examination, the expert conceded that the low percentage upon which he testified only represented the false allegations that were actually discovered to be false. Indeed, during his closing argument, defense counsel highlighted the expert's testimony that children can lie and that the low

Moreover, considering that *Peterson*, which was issued many years before the trial in this case, found error when an expert testified about the extremely low percentage of children who lie about sexual abuse, we conclude that the performance by defendant's trial counsel was deficient for failure to object to such testimony and that defendant was prejudiced by counsel's error. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (ineffective assistance of counsel requires deficient performance and a showing of prejudice, which is established when there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, with a reasonable probability being a probability sufficient to undermine confidence in the outcome). Accordingly, reversal is warranted on the basis of plain error affecting defendant's substantial rights and on the basis of ineffective assistance of counsel.[6]

We reverse and remand for new trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Mark T. Boonstra

> percentage only reflected known false allegations. Additionally, even during redirect-examination by the prosecution, the expert admitted that "[t]here is literature out there that is extremely variable in its . . . identification of fabricated disclosures." The expert also identified certain factual situations in which children were found to be lying regarding sexual abuse. Defendant has simply not established the requisite prejudice to warrant reversal of the convictions. [Unpub op at 2 (citations omitted).]

The circumstances here are not any more favorable to the prosecution than in *Thorpe* and are probably less favorable.

[6] In light of our ruling, there is no need to address defendant's additional appellate arguments presented in his Standard 4 brief.